No. 17-6086

# In the Supreme Court of the United States

HERMAN AVERY GUNDY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SECOND CIRCUIT*

**BRIEF FOR THE UNITED STATES**


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## QUESTION PRESENTED

Whether the Sex Offender Registration and Notification Act's delegation of authority to the Attorney General to issue regulations under 34 U.S.C. 20913(d) violates the nondelegation doctrine.

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## OPINIONS BELOW

The opinion of the court of appeals (J.A. 13-18) is not published in the Federal Reporter but is reprinted at 695 Fed. Appx. 639. A previous opinion of the court of appeals (J.A. 19-37) is reported at 804 F.3d 140. The relevant opinions and orders of the district court (J.A. 46-88) are not published in the Federal Supplement but are available at 2013 WL 4838845 and 2013 WL 2247147.

## JURISDICTION

The judgment of the court of appeals was entered on June 22, 2017. The petition for a writ of certiorari was filed on September 20, 2017. The petition was granted on March 5, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-18a.

## STATEMENT

In 2004, petitioner gave cocaine to an 11-year-old girl and raped her, for which he was convicted of a sexual offense under Maryland law. J.A. 25-26, 60. In 2012, after petitioner was released from prison, he traveled from Pennsylvania to New York but did not register as a sex offender in New York (or anywhere else). J.A. 15. Following a bench trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of failing to register as a sex offender after traveling in interstate commerce, in violation of 18 U.S.C. 2250(a). J.A. 16. Petitioner was sentenced to time served and five years of supervised release. *Ibid.* The court of appeals affirmed. J.A. 13-18.

1. This Court has observed that "[s]ex offenders are a serious threat in this Nation," largely because their victims "are most often juveniles" and because sex offenders "are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McKune* v. *Lile*, 536 U.S. 24, 32-33 (2002) (plurality opinion); see *Smith* v. *Doe*, 538 U.S. 84, 103 (2003) (noting "grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class"). Seeking to address those concerns, Congress has repeatedly enacted legislation to encourage and assist States in tracking sex offenders' addresses and "inform[ing] the public" about them "for its own safety." *Smith*, 538 U.S. at 99.

a. In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act), Pub. L. No. 103-322, § 170101, 108 Stat. 2038 (42 U.S.C. 14071 *et seq.*). The Wetterling Act encouraged States to adopt sex-offender registration laws that met certain minimum standards, by making the adoption of such laws a condition of receiving certain federal funding. *Smith*, 538 U.S. at 89-90. By 1996, every State and the District of Columbia had enacted a sex-offender-registration law. *Id.* at 90.

In 1996, Congress bolstered the minimum federal standards by adding a mandatory community-notification provision to the Wetterling Act. Megan's Law, Pub. L. No. 104-145, § 2, 110 Stat. 1345 (42 U.S.C. 14071(e)). Congress also strengthened the national effort to ensure sex-offender registration by directing the FBI to create a national sex-offender database; requiring lifetime registration for certain offenders; and making the failure of certain persons to register a federal crime, subject to penalties including imprisonment. Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, § 2, 110 Stat. 3093 (42 U.S.C. 14072).

b. Despite those efforts, Congress grew concerned about "loopholes and deficiencies" in existing registration and notification statutes, which resulted in an estimated 100,000 sex offenders becoming "missing" or "lost." H.R. Rep. No. 218, 109th Cong., 1st Sess. Pt. 1, at 20, 26 (2005). In 2006, to address those concerns, it

enacted the Sex Offender Registration and Notification Act (SORNA), Pub. L. No. 109-248, Tit. I, 120 Stat. 590 (34 U.S.C. 20901 *et seq.*).[1]

i. Congress enacted SORNA to make "more uniform and effective" the existing "patchwork" of federal and state sex-offender registration systems. *Reynolds* v. *United States*, 565 U.S. 432, 435 (2012). SORNA's express "purpose" is to "protect the public from sex offenders and offenders against children" by "establish[ing] a comprehensive national system for the registration of those offenders." 34 U.S.C. 20901. To that end, SORNA "repeal[ed] several earlier federal laws that also (but less effectively) sought uniformity," and in their place it established new "comprehensive registration-system standards" and made certain "federal funding contingent on States' bringing their systems into compliance with those standards." *Reynolds*, 565 U.S. at 435. Congress authorized the Attorney General to adopt regulations implementing SORNA generally, 34 U.S.C. 20912(b), and to "determine[]" whether a particular jurisdiction receiving federal funding has "fail[ed] * * * to substantially implement" SORNA's requirements, 34 U.S.C. 20927(a) and (d).

SORNA also imposed requirements directly on "both state and federal sex offenders to register with relevant

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[1] Effective September 1, 2017, after the court of appeals issued its decision, SORNA's provisions previously codified at 42 U.S.C. 16901 *et seq.* were recodified as 34 U.S.C. 20901 *et seq.*; the statutory text was not changed. Office of the Law Revision Counsel, U.S. House of Representatives, *Editorial Reclassification: Title 34, United States Code*, http://uscode.house.gov/editorialreclassification/t34/index.html. For consistency, this brief refers throughout to the current, recodified provisions.

jurisdictions (and to keep registration information current)," backed by new criminal sanctions. *Reynolds*, 565 U.S. at 435; see 34 U.S.C. 20913(a)-(c); 18 U.S.C. 2250(a). Section 20913 provides that every "sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 34 U.S.C. 20913(a). A "sex offender" means "an individual who was convicted of" any one of various enumerated "sex offense[s]," including (*inter alia*) various sex crimes involving minors. 34 U.S.C. 20911(1); see 34 U.S.C. 20911(5)-(7). That "broad[]" definition of sex offender "reflects [Congress's] purpose" of creating a "comprehensive national system for the registration of sex offenders." *Reynolds*, 565 U.S. at 442 (brackets, citation, and internal quotation marks omitted).

Section 20913 establishes deadlines by which sex offenders must register and update their registration. 34 U.S.C. 20913(b) and (c). A sex offender "shall initially register * * * before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement." 34 U.S.C. 20913(b)(1). "[I]f the sex offender is not sentenced to a term of imprisonment," then he "shall initially register * * * not later than 3 business days after being sentenced for that offense." 34 U.S.C. 20913(b)(2). Thereafter, "[a] sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction" where the offender resides, is an employee, or is a student, and shall "inform that jurisdiction of all changes in the information required for that offender in the sex offender registry." 34 U.S.C. 20913(c).

To enforce those registration requirements, Congress "creat[ed] federal criminal sanctions applicable to those who violate" them. *Reynolds*, 565 U.S. at 435; 18 U.S.C. 2250(a). Section 2250(a) provides that a person who "is required to register under [SORNA]" based on a state conviction for a sex offense, who "travels in interstate or foreign commerce," and who then "knowingly fails to register or update a registration as required by [SORNA] shall be fined under this title or imprisoned not more than 10 years, or both." 18 U.S.C. 2250(a)(1), (2)(B), and (3). "For a defendant to violate [Section 2250(a)], * * * the statute's three elements must be satisfied in sequence," *i.e.*, the offender must first "become[] subject to SORNA's registration requirements," he "must then travel in interstate commerce," and he must "thereafter fail to register." *Carr* v. *United States*, 560 U.S. 438, 446 (2010) (citation and internal quotation marks omitted).[2]

ii. One issue of particular concern to Congress was registration of offenders who had committed covered sex offenses before SORNA's enactment—tens of thousands of whom were believed to be "missing from the system" in existing databases. *Reynolds*, 565 U.S. at 443; see *id.* at 442 (SORNA's "history * * * reveals that many of its supporters placed considerable importance upon the registration of pre-Act offenders"). Consistent with that concern and the "basic statutory purpose" of creating a "comprehensive national system for the registration of sex offenders," this Court has observed that, "in general, [SORNA's] criminal provisions apply to any

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[2] The requirement to travel in interstate or foreign commerce does not apply to offenders subject to SORNA based on a conviction under federal, District of Columbia, tribal, or territorial law. See 18 U.S.C. 2250(a)(2)(A).

pre-Act offender required to register under the Act who later travels interstate and fails to register." *Id.* at 442 (brackets and citation omitted).

Congress also recognized, however, that the mechanics of applying SORNA's "new registration requirements to pre-Act offenders" presented "what Congress may well have thought were practical problems." *Reynolds*, 565 U.S. at 440; see *id.* at 441-443. One concern was how SORNA's registration deadlines would apply to pre-Act offenders "who [we]re unable to comply with" them. 34 U.S.C. 20913(d). For offenders who had completed their prison sentences before SORNA's enactment, Section 20913(b)'s registration deadline already would have passed; that could have created "uncertainties" about when they needed to register. *Reynolds*, 565 U.S. at 442. In addition, SORNA's goal of "mak[ing] more uniform a patchwork of pre-existing state [registration] systems" required changing some States' registration rules, including "newly registering or reregistering 'a large number' of pre-Act offenders." *Id.* at 440.

Given those practical concerns, in Section 20913(d) Congress directed "the Department of Justice, charged with responsibility for implementation, to examine these" and other "pre-Act offender problems and to apply the new registration requirements accordingly." *Reynolds*, 565 U.S. at 441. Section 20913(d) is captioned "Initial registration of sex offenders unable to comply with" Section 20913(b), which sets SORNA's initial-registration deadlines. 34 U.S.C. 20913(d). It states that "[t]he Attorney General shall have the authority to specify the applicability of the requirements of [SORNA] to sex offenders convicted before [SORNA's] enactment" in 2006 "or its implementation in a particular jurisdiction." *Ibid.* Section 20913(d) further authorizes the Attorney General

"to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with [Section 20913(b)]." *Ibid.*

On February 28, 2007, pursuant to Section 20913(d), the Attorney General issued an interim rule, effective on that date, specifying that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 72 Fed. Reg. 8897 (28 C.F.R. 72.3 (2008)). The interim rule also provided two examples illustrating how SORNA's registration requirements would apply to such pre-Act offenders. *Ibid.* In 2010, the Attorney General promulgated a final regulation that "finaliz[ed] [the] interim rule," with "minor changes" to clarify one of the interim rule's illustrative examples in order "to avoid any arguable inconsistency with [this] Court's holding in *Carr*." 75 Fed. Reg. 81,849, 81,850, 81,853 (Dec. 29, 2010). The regulations' operative text making the registration requirement applicable to all pre-Act offenders has not changed.

iii. In addition to those regulations, in 2008 the Attorney General issued guidelines intended to "provide guidance and assistance to the states and other jurisdictions in incorporating the SORNA requirements into their sex offender registration and notification programs." 73 Fed. Reg. 38,030 (July 2, 2008) (Guidelines). The Guidelines reaffirmed SORNA's application to all sex offenders, and they provided guidance on how jurisdictions should address timing and other logistical issues in registering various categories of pre-Act offenders. *Id.* at 38,035-38,036, 38,046, 38,063-38,064.

The Guidelines also "identifie[d] * * * the minimum required for SORNA compliance" by States and other

jurisdictions, but they emphasized that SORNA "generally constitutes a set of *minimum* national standards and sets a floor, not a ceiling, for jurisdictions' programs," and "[j]urisdictions are free" to impose broader or additional requirements. 73 Fed. Reg. at 38,046-38,047. For example, the Guidelines explained that, because "[t]he required registration period [under SORNA] begins to run upon release from custody," a jurisdiction may "credit a sex offender with a pre-SORNA conviction with the time elapsed from his release," but a jurisdiction may instead choose to go beyond SORNA's requirements and not credit that time. *Id.* at 38,036, 38,046-38,047, 38,068; see 75 Fed. Reg. at 81,851. In 2011, the Attorney General issued supplemental guidelines reiterating that understanding. 76 Fed. Reg. 1630, 1636, 1639 (Jan. 11, 2011).

2. a. In 1994, petitioner pleaded guilty in the United States District Court for the Eastern District of Pennsylvania to one count of conspiracy to distribute cocaine base, in violation of 21 U.S.C. 846. J.A. 60. In 1996, he was sentenced to five years of imprisonment, to be followed by five years of supervised release. *Ibid.* Jurisdiction over petitioner was later transferred to the District of Maryland. *Ibid.*

In 2004, while serving his supervised-release term, petitioner gave cocaine to an 11-year-old girl and raped her. See J.A. 25-26; D. Ct. Doc. 16-2, at 7-12 (Mar. 22, 2013). In 2005, he entered a nolo contendere plea in Maryland state court and was convicted of sexual offense in the second degree. J.A. 25, 60. The court sentenced him to 20 years of imprisonment (with ten years suspended), to be followed by five years of probation, and ordered petitioner to register as a sex offender. *Ibid.*; C.A. App. A67, A70.

Petitioner's Maryland state-court conviction violated a condition of his federal supervised release. J.A. 26. In 2006, he pleaded guilty to the supervised-release violation. *Ibid.* The federal court revoked petitioner's supervised release and ordered him to serve 24 months of imprisonment, to be served consecutively to his Maryland state-court sentence. *Ibid.*

b. In November 2010, petitioner completed the custodial portion of his Maryland sentence. J.A. 26. He was transferred to federal custody to serve his federal revocation term, and he ultimately was transferred to a federal correctional facility in Pennsylvania. *Ibid.*; see D. Ct. Doc. 16, ¶ 9 (Mar. 22, 2013); D. Ct. Doc. 34, at 5 & n.3 (May 31, 2013).

In March 2012, while serving his federal revocation term, petitioner sought and received permission to serve the remaining portion of that term in a halfway house. J.A. 26; see C.A. App. A220. On July 17, 2012, after receiving a furlough for travel, petitioner traveled unescorted by commercial bus from the correctional facility in Pennsylvania to a halfway house in New York City. J.A. 15, 26; see C.A. App. A124-A126. On August 27, 2012, petitioner was released from the halfway house to a private residence in the Bronx. J.A. 15. Petitioner did not register as a sex offender either in Maryland or in New York, as required by state law. *Ibid.*

3. a. A grand jury in the Southern District of New York returned an indictment charging petitioner with one count of failing to register as a sex offender, in violation of 18 U.S.C. 2250(a), based on his failure to register after traveling from Pennsylvania to New York in 2012. J.A. 45. The district court dismissed the indict-

ment, reasoning that petitioner was not required to register at the time he traveled interstate, J.A. 60-88, but the court of appeals reversed and remanded, J.A. 29-37.

Petitioner proceeded to a bench trial on stipulated facts, and the district court found petitioner guilty of violating Section 2250. J.A. 14-15. It rejected his contention that Congress impermissibly delegated legislative power when it authorized the Attorney General to specify the application of SORNA's registration requirements to pre-SORNA offenders. J.A. 90.

b. The court of appeals affirmed. J.A. 14-18. It rejected petitioner's nondelegation challenge to SORNA based on its earlier decision in *United States* v. *Guzman*, 591 F.3d 83, 91-92 (2d Cir.), cert. denied, 561 U.S. 1019 (2010). J.A. 18 n.2. In *Guzman*, the court of appeals had held that, assuming Section 20913(d) authorizes the Attorney General to determine the applicability of SORNA to pre-SORNA offenders, it does not violate the nondelegation principle under this Court's precedent.[3] 591 F.3d at 91; see *id.* at 91-93. *Guzman* explained that "[a] delegation is 'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" *Id.* at 92-93 (quoting *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946)). The court held that SORNA satisfies those requirements. *Id.* at 93. It reasoned that "[t]he Attorney General's authority under

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[3] As *Guzman* observed, lower courts were then divided on whether Section 20913(d) conferred that authority, or instead gave the Attorney General only discretion regarding how SORNA's registration requirement "should be implemented" to pre-Act offenders. 591 F.3d at 91. In *Reynolds*, this Court adopted the former reading, see 565 U.S. at 445, which the *Guzman* court had assumed arguendo, see 591 F.3d at 92-93.

SORNA is highly circumscribed." *Ibid.* SORNA "includes specific provisions delineating what crimes require registration; where, when, and how an offender must register; what information is required of registrants; and the elements and penalties for the federal crime of failure to register." *Ibid.* (citations omitted). Section 20913(d), *Guzman* concluded, merely authorizes the Attorney General to determine the applicability of SORNA's registration requirements, and "only with respect to the limited class of individuals who were convicted of covered sex offenses prior to SORNA's enactment." *Ibid.*

## SUMMARY OF ARGUMENT

I. SORNA's delegation of authority to the Attorney General to specify the applicability of SORNA's statutory registration requirements to pre-SORNA sex offenders comports with this Court's precedent.

A. The Court has long held that, although Congress may not delegate legislative power, it may confer discretion on the Executive to implement and enforce federal law so long as it provides an "intelligible principle." *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928). A delegation passes muster under that standard "if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority." *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946). Applying that standard, the Court has upheld numerous delegations of authority across a wide range of substantive areas, including laws that carried criminal penalties. The Court has found only two statutory delegations to violate this standard, both of which provided no guidance to the Executive.

B. SORNA's delegation comports with this Court's precedent. Petitioner correctly does not dispute that

Congress "clearly delineate[d]" the official to whom it delegated authority (the Attorney General) and the "boundaries of th[at] delegated authority." *American Power & Light*, 329 U.S. at 105. Indeed, Congress itself "made virtually every legislative determination" and confined "the Attorney General's discretion to a narrow and defined category": determining the applicability of a statutory registration requirement to pre-SORNA sex offenders. *United States* v. *Ambert*, 561 F.3d 1202, 1214 (11th Cir. 2009). The only question here is whether Congress sufficiently identified the "general policy" that the Attorney General should pursue in making that determination. *American Power & Light*, 329 U.S. at 105.

It did. As this Court explained in *Reynolds* v. *United States*, 565 U.S. 432 (2012), SORNA's text and context make clear that Congress's general policy was to require sex offenders (including pre-Act offenders) to register to the maximum extent feasible. *Id.* at 442-445. That is exactly what the Attorney General has done. The narrow scope of the authority SORNA delegated confirms that the guidance Congress supplied is sufficient. The extent of the discretion SORNA confers is the same as a statute that required all pre-Act offenders to register but authorized the Attorney General to grant waivers to pre-Act offenders. Although such a statute would have established a different transition-period default rule for pre-Act offenders until the Attorney General acted, the scope of his authority—and thus the specificity with which Congress had to articulate the general policy—would be the same.

II. Petitioner argues in the alternative that heightened nondelegation scrutiny should apply to laws that raise retroactivity or federalism concerns and to laws that

authorize the Executive to define crimes. The Court need not reach those arguments for two reasons. First, because SORNA, properly construed, establishes a general policy that pre-SORNA offenders should be required to register to the extent possible, that policy provides sufficient guidance to the Attorney General under any level of scrutiny. Second, none of the specific concerns petitioner raises is implicated by SORNA, and this case therefore provides no occasion to address them. In any event, this Court already has rejected application of different, subject-matter-specific nondelegation standards in other contexts, and it has never held that the concerns petitioner raises require a special standard. Petitioner does not justify departing from this Court's precedent.

## ARGUMENT

### I. SORNA DELEGATED NONLEGISLATIVE POWER TO THE EXECUTIVE CONSISTENT WITH THIS COURT'S PRECEDENT

The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." Art. I, § 1. The Court has explained that "[t]his text permits no delegation of those powers." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 472 (2001). The Court "ha[s] recognized, however, that the separation-of-powers principle, and the nondelegation doctrine in particular, do not prevent Congress from obtaining the assistance of its coordinate Branches." *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989). The Court has accordingly held that Congress may confer discretion on the Executive to implement and enforce the laws so long as it supplies an "intelligible principle" defining the limits of that discretion. *Ibid.* (quoting *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928)).

As all 11 courts of appeals to address the issue have concluded, SORNA satisfies that standard. Read as a whole, the statute clearly conveys Congress's policy that pre-Act offenders be required to register to the extent feasible. SORNA's goal is to "establish[] a comprehensive national system for the registration of [sex] offenders," 34 U.S.C. 20901, and that policy "includes offenders who committed their offenses before [SORNA] became law," *Reynolds* v. *United States*, 565 U.S. 432, 442 (2012) (emphasis omitted). That the Attorney General may decide whether and when practical concerns mean that pre-Act offenders need not register should not be dispositive.

### A. Congress May Delegate Discretion To The Executive If It Supplies An Intelligible Principle By Defining The General Policy, The Official To Whom Authority Is Delegated, And The Limits Of The Delegated Authority

As this Court has previously held, the Constitution does not "deny[] to the Congress the necessary resources of flexibility and practicality * * * to perform its function." *Yakus* v. *United States*, 321 U.S. 414, 425 (1944) (citation omitted). Accordingly, the Court "ha[s] 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" *American Trucking*, 531 U.S. at 474-475 (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)). The Court's precedents likewise make clear that "Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers." *Yakus*, 321 U.S. at 425-426. Instead, the "extent and character of [the] assistance" Congress may seek from another branch in a particular context "must be fixed according to common sense and the inherent necessities

of the governmental co-ordination" at issue, *J.W. Hampton*, 276 U.S. at 406—matters Congress is typically best positioned to assess. See *Mistretta*, 488 U.S. at 372 (explaining importance of Congress's "ability to delegate" authority to address "ever changing and more technical problems"); *id.* at 416 (Scalia, J., dissenting) ("Congress is no less endowed with common sense than we are, and better equipped to inform itself of the 'necessities' of government," and "the factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political.").

Consistent with that understanding, "[f]rom the beginning of the Government," Congress has enacted, and the Court has upheld, statutes "conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern." *United States* v. *Grimaud*, 220 U.S. 506, 517 (1911). As early as the Washington Administration, Congress enacted broad delegations that do not appear to have been challenged on nondelegation grounds in this Court. For example, the First Congress delegated authority to the Executive to license and regulate trade with Indian tribes, Act of July 22, 1790, ch. 33, 1 Stat. 137; to issue patents, Act of Apr. 10, 1790, ch. 7, 1 Stat. 109; and to regulate military-disability pay, Act of Apr. 30, 1790, ch. 10, § 11, 1 Stat. 119. Early Congresses also enacted a series of statutes that delegated to the President the power to impose or lift trade sanctions and tariffs. *Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 683-689 (1892).

The Court rejected a nondelegation challenge to one such statute in 1813. See *The Cargo of the Brig Aurora* v. *United States*, 11 U.S. (7 Cranch) 382 (1813). The Non-Intercourse Act of March 1, 1809, ch. 24, 2 Stat.

528, embargoed British and French ships from American ports. The Act expired after a year, but Congress renewed a revised version that made the embargo contingent on a presidential proclamation reviving the embargo as to either Great Britain or France. See *Marshall Field*, 143 U.S. at 682; Act of May 1, 1810, ch. 39, § 4, 2 Stat. 606. President Madison issued such a proclamation as to Great Britain. See *Marshall Field*, 143 U.S. at 682. The *Aurora*, a British ship, subsequently docked in New Orleans, and the government seized its cargo under the Act. *The Brig Aurora*, 11 U.S. (7 Cranch) at 387-388. The cargo's owner sued, contending that "Congress could not transfer the legislative power to the President" and that "[t]o make the revival of a law depend upon the President's proclamation, is to give to that proclamation the force of law." *Id.* at 386 (argument of counsel). The Court rejected that challenge, concluding that it could "see no sufficient reason[] why the legislature should not exercise its discretion in reviving the [Act], either expressly or conditionally, as their judgment should direct." *Id.* at 388.

Congress enacted similar trade statutes throughout the late 1700s and the 1800s. See *Marshall Field*, 143 U.S. at 683-689. It does not appear that the Court addressed another nondelegation challenge to such a law until 1892, when the Court in *Marshall Field* again upheld a statute making country-specific tariffs contingent on Presidential determinations. *Id.* at 681-694. The Court explained that *The Brig Aurora* and the history of "so many acts of Congress," which "embrac[ed] almost the entire period of our national existence," foreclosed the challengers' nondelegation argument. *Id.* at 691.

Applying the same principles, the Court rejected nondelegation challenges to a number of other statutes

through the early 1900s, including laws that carried criminal penalties. For example, in *In re Kollock*, 165 U.S. 526 (1897), the Court upheld a statute that authorized the Commissioner of Internal Revenue to issue regulations defining packaging requirements for oleomargarine and imposed criminal penalties for selling improperly packaged products. *Id.* at 532-533. In *Union Bridge Co.* v. *United States*, 204 U.S. 364, 387 (1907) (Harlan, J.), the Court sustained a statute that authorized the Secretary of War to order modifications to any bridge he found was "an unreasonable obstruction to the free navigation of" a navigable water way and imposed criminal penalties for refusal to make such modifications. *Id.* at 366 (statement of case) (citation omitted); see *id.* at 386-388 (upholding statute and explaining that a "denial to Congress of the right, under the Constitution, to delegate the power to determine some fact or the state of things upon which the enforcement of its enactment depends would be 'to stop the wheels of government' and bring about confusion, if not paralysis, in the conduct of the public business"). And *Grimaud* rejected a nondelegation challenge to a statute that authorized the Secretary of Agriculture to set rules for grazing in public forest reservations in order "to regulate their occupancy and use and to preserve the forests thereon from destruction," subject to criminal penalties for grazing without a permit. 220 U.S. at 515-517.

In 1928, the Court (per Chief Justice Taft) summarized its decisions as providing that "legislative action is not a forbidden delegation of legislative power," so long as "Congress shall lay down by legislative act an intelligible principle to which the person or body authorized" to exercise the delegated authority "is directed to conform." *J.W. Hampton*, 276 U.S. at 409.

Nearly 20 years later, the Court clarified that a delegation is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority." *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946).

Applying those principles over the last 90 years, the Court has upheld nearly every statutory delegation it has confronted, including delegations:

- To the President to set and adjust tariffs as needed to "equalize the * * * differences in costs of production" between foreign and domestic goods. *J.W. Hampton*, 276 U.S. at 401 (citation omitted); see *id.* at 407-411.
- To the Federal Communication Commission (FCC) to regulate broadcast licensing "as public interest, convenience, or necessity" requires. *National Broad. Co.* v. *United States*, 319 U.S. 190, 225-226 (1943) (*NBC*).
- To the Federal Power Commission to determine "just and reasonable" rates for wholesale sales of natural gas. *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U.S. 591, 600 (1944).
- To the Price Administrator to fix commodity prices that would be "fair and equitable" and would "effectuate the purposes of th[e] [Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23]"—the violation of which resulted in criminal sanctions. *Yakus*, 321 U.S. at 420 (citation omitted); see *id.* at 425-427.

- To the Securities and Exchange Commission (SEC) to prevent unfair or inequitable distribution of voting power among security holders. *American Power & Light*, 329 U.S. at 105.
- To the Secretary of War to determine and recover "excessive profits" from military contractors. *Lichter* v. *United States*, 334 U.S. 742, 785-786 (1948).
- To the Federal Home Loan Administration to make "rules and regulations * * * for the reorganization, consolidation, merger, or liquidation of [savings-and-loan] associations." *Fahey* v. *Mallonee*, 332 U.S. 245, 247, 249-250 (1947) (citation omitted).
- To the Sentencing Commission to promulgate then-binding Sentencing Guidelines establishing the permissible sentences for federal crimes. *Mistretta*, 488 U.S. at 374-377.
- To the Attorney General to designate controlled substances on a temporary basis—resulting in criminal penalties for unauthorized manufacture, possession, or distribution of such substances. *Touby* v. *United States*, 500 U.S. 160, 165-167 (1991).
- To the President to identify aggravating factors used to impose the death penalty in courts martial. *Loving* v. *United States*, 517 U.S. 748, 771-774 (1996).
- To the Environmental Protection Agency (EPA) to set nationwide air-quality standards limiting pollution to the level required "to protect the public health." *American Trucking*, 531 U.S. at 472 (quoting 42 U.S.C. 7409(b)(1)); see *id.* at 472-476.

In the Nation's history, only twice has the Court found that delegations exceeded Congress's authority. *American Trucking*, 531 U.S. at 474. In 1935, the Court concluded that two provisions of the National Industrial Recovery Act (Recovery Act), ch. 90, 48 Stat. 195—enacted in response to the Great Depression—contained "excessive delegations" because Congress "failed to articulate *any* policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power." *Mistretta*, 488 U.S. at 373 & n.7 (emphasis added). The Court held those provisions invalid because "one * * * provided literally no guidance for the exercise of discretion, and the other * * * conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *American Trucking*, 531 U.S. at 474. Since 1935, the Court has "upheld, again without deviation, Congress' ability to delegate power under broad standards." *Mistretta*, 488 U.S. at 373.

### B. SORNA Comports With This Court's Precedent Because The Statute As A Whole Supplies An Intelligible Principle

This Court has thus long held that Congress may grant discretion to the Executive so long as it "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton*, 276 U.S. at 409. A delegation is "constitutionally sufficient if Congress clearly delineates" (1) "the general policy" to be pursued, (2) "the public agency which is to apply it," and (3) "the boundaries of th[e] delegated authority." *American Power & Light*,

329 U.S. at 105. As all 11 courts of appeals to address the issue have concluded, SORNA meets that standard.[4]

***1. Congress identified the official to whom authority is delegated and the limits of the delegated authority***

Petitioner does not directly address the *American Power & Light* standard in his brief, but he does not appear to dispute that SORNA satisfies its second and third prongs. As to the second prong, SORNA unquestionably identifies "the public agency which is to apply" SORNA's federal policy, *American Power & Light*, 329 U.S. at 105, by expressly vesting discretion in "[t]he Attorney General." 34 U.S.C. 20913(d).

As to the third prong, Congress also "clearly delineate[d] * * * the boundaries of th[e] delegated authority." *American Power & Light*, 329 U.S. at 105. Congress itself "made virtually every legislative determination in enacting SORNA, which has the effect of constricting the Attorney General's discretion to a narrow and defined category." *United States* v. *Ambert*,

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[4] See *United States* v. *Parks*, 698 F.3d 1, 7-8 (1st Cir. 2012), cert. denied, 569 U.S. 960 (2013); *United States* v. *Guzman*, 591 F.3d 83, 91-93 (2d Cir.), cert. denied, 561 U.S. 1019 (2010); *United States* v. *Cooper*, 750 F.3d 263, 266-272 (3d Cir.), cert. denied, 135 S. Ct. 209 (2014); *United States* v. *Sampsell*, 541 Fed. Appx. 258, 259-260 (4th Cir. 2013) (per curiam); *United States* v. *Whaley*, 577 F.3d 254, 262-264 (5th Cir. 2009); *United States* v. *Felts*, 674 F.3d 599, 606 (6th Cir. 2012); *United States* v. *Goodwin*, 717 F.3d 511, 516-517 (7th Cir.), cert. denied, 571 US. 929 (2013); *United States* v. *Kuehl*, 706 F.3d 917, 918-920 (8th Cir. 2013); *United States* v. *Richardson*, 754 F.3d 1143, 1145-1146 (9th Cir. 2014) (per curiam); *United States* v. *Nichols*, 775 F.3d 1225, 1230-1232 (10th Cir. 2014), rev'd on other grounds, 136 S. Ct. 1113 (2016); *United States* v. *Ambert*, 561 F.3d 1202, 1212-1214 (11th Cir. 2009); cf. *United States* v. *Ross*, 848 F.3d 1129, 1131 (D.C. Cir. 2017) (noting circuit consensus but finding it unnecessary to "reach the delegation issue").

561 F.3d 1202, 1214 (11th Cir. 2009). Congress "defined the crimes which necessitate registration" in the first place. *Ibid.* (citing 34 U.S.C. 20911). Congress prescribed "where the offender must register," the default "time period" and "method" for doing so, and "the nature of information that registrants must provide." *Ibid.* (citing 34 U.S.C. 20913(a)-(c), 20914(a)). And Congress defined "the elements of the new federal crime" of failing to register and "the penalty for violation." *Ibid.* (citing 18 U.S.C. 2250(a)).

Having addressed all of those matters in the statute, Congress accorded the Attorney General the "authority to specify the applicability of the requirements of this subchapter [*i.e.*, SORNA] to sex offenders convicted before the enactment of [SORNA] or its implementation in a particular jurisdiction," and also "to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with [Section 20913(b)]," 34 U.S.C. 20913(d), which sets the deadlines for "[i]nitial registration," 34 U.S.C. 20913(b). "The Attorney General" thus "is left only with the discretion to determine whether" SORNA's civil registration requirements "articulated by the legislature apply" to "a narrow and defined category" of sex offenders: "those convicted prior to July 27, 2006," when SORNA was enacted, or before SORNA's implementation in a particular jurisdiction. *Ambert*, 561 F.3d at 1214.[5]

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[5] Other SORNA provisions authorize the Attorney General to specify additional information about sex offenders to be included in registries, 34 U.S.C. 20914(a)(8) and (b)(8), to prescribe requirements regarding the time and manner for sex offenders to provide and update information, 34 U.S.C. 20914(c), and to adopt "guidelines and regulations to interpret and implement" SORNA, 34 U.S.C. 20912(b). Petitioner does not challenge any of those authorizations here.

*2. Congress identified the general policy it intended the Attorney General to pursue*

Petitioner appears to dispute (Br. 31-36, 41-50) the first *American Power & Light* prong: that Congress must identify the "general policy" for the Attorney General to pursue. 329 U.S. at 105. As the Court's decision in *Reynolds* demonstrates, however, SORNA's text and context make clear that Congress's general policy was to require sex offenders (including pre-Act offenders) to register to the maximum extent feasible. See 565 U.S. at 442-445. Petitioner's treatment (Br. 31-36) of Section 20913(d) as a barren grant of authority bereft of any guidance ignores the totality of the statutory text, critical context, and *Reynolds*.

a. SORNA's express "purpose" is to "protect the public from sex offenders and offenders against children" by "establish[ing] a *comprehensive* national system for the registration of those offenders." 34 U.S.C. 20901 (emphasis added). That purpose "*includes* offenders who committed their offenses before [SORNA] became law." *Reynolds*, 565 U.S. at 442. As *Reynolds* explained, the text of "[t]he Act reflects that purpose when it defines 'sex offender' broadly to include any 'individual who was convicted of a sex offense.'" *Ibid.* (quoting 34 U.S.C. 20911(1)).

The Act's historical context confirms its text. Congress had previously enacted several statutes designed to ensure that sex offenders register, but those efforts had left significant gaps and inconsistencies. See pp. 2-4, *supra*. As the Court recounted in *Reynolds*, Congress was concerned that more than 100,000 convicted sex offenders were already "missing from the system." 565 U.S. at 443. Ensuring "registration of pre-Act offenders" was therefore a central part of the problem that

SORNA was enacted to solve. *Id.* at 442; see *Ambert*, 561 F.3d at 1213 (Congress "created SORNA with the specific design to provide the broadest possible protection to the public, and to children in particular, from sex offenders"). Petitioner's focus on Section 20913(d) in isolation fails to account for the Act's other provisions and its history, which bring SORNA's general policy into sharp relief.

Indeed, the Court already observed in *Reynolds* that Congress wanted to cover pre-SORNA offenders, but left to the Attorney General implementation of that directive to the extent possible in light of potential practical problems. At issue in *Reynolds* was whether SORNA's registration requirements applied to pre-Act offenders before the Attorney General so specified. 565 U.S. at 439. The Court determined that construing the registration requirement to apply automatically to pre-Act offenders (with the Attorney General able "only to make exceptions" to such blanket coverage) was unnecessary because it was readily apparent when SORNA was enacted that Congress intended the Attorney General to require pre-Act offenders to register to the maximum extent feasible. *Id.* at 445. The Court found "no reason to believe that Congress feared that the Attorney General would refuse to apply the new requirements to pre-Act offenders," and thus "no need for a mandatory requirement to avoid that unrealistic possibility." *Id.* at 444-445. The Court's interpretation of SORNA thus rested on the premise that the Act's general policy is clear.

The Attorney General implemented that policy in 2007 by specifying that all pre-Act offenders were required to register. 28 C.F.R. 72.3 (2008). Contrary to petitioner's suggestion (Br. 32), that rule has remained in force ever since. See 28 C.F.R. 72.3. Although one of

the rule's illustrative examples was clarified in 2010, the regulation's operative text has not changed. *Ibid.* And even the clarification—made "to avoid any arguable inconsistency with [this] Court's holding in *Carr* [v. *United States*, 560 U.S. 438 (2010)]," 75 Fed. Reg. at 81,853—embodies the same general policy of requiring pre-Act offenders to register to the maximum extent feasible. Petitioner argues (Br. 32-33) that over time Attorneys General have modified the requirements that jurisdictions must meet to satisfy SORNA's funding conditions. But the registration duty that SORNA and the regulation impose on pre-Act sex offenders has been constant.

b. *Reynolds* also explained why, even though SORNA's general policy regarding registration of pre-Act offenders was clear, Congress deemed it necessary to grant discretion to the Executive. The mechanics of applying SORNA's "new registration requirements to pre-Act offenders" raised logistical questions and presented "what Congress may well have thought were practical problems." *Reynolds*, 565 U.S. at 440; see *id.* at 441-443. As Section 20913(d)'s text reflects, one concern was how SORNA's registration deadlines would apply to pre-Act offenders "who are unable to comply with" them. 34 U.S.C. 20913(d). Section 20913(b) provides that a sex offender "shall initially register * * * before completing [his] sentence of imprisonment," or within three business days of being sentenced if no "term of imprisonment" is imposed. 34 U.S.C. 20913(b). For offenders who had completed their prison sentences before SORNA's enactment and still were required to register, that deadline already would have passed, creating "uncertainties" about when such pre-Act offenders must register. *Reynolds*, 565 U.S. at 442; see *id.* at 442-443.

In addition, a principal goal of SORNA was "to make more uniform a patchwork of pre-existing state [registration] systems." *Reynolds*, 565 U.S. at 440. That in turn required changing the registration rules in some States, including "newly registering or reregistering 'a large number' of pre-Act offenders," which could have been both costly and cumbersome. *Ibid.* Solving these problems required federal-state cooperation and judgment about what would be feasible in the new nationwide registration system.

To address those concerns, Congress adopted the "efficient and desirable solution" in Section 20913(d) of "[a]sking the Department of Justice, charged with responsibility for implementation, to examine these" and other "pre-Act offender problems and to apply the new registration requirements accordingly." *Reynolds*, 565 U.S. at 441. "A ruling from the Attorney General" on these matters "could diminish or eliminate th[e] uncertainties" created by translating the new registration requirements to pre-Act offenders. *Id.* at 441-442. The Attorney General was particularly well positioned to examine these questions and provide practical guidance in light of the Department of Justice's experience in this area. In the 12 years between Congress's first legislation in this area and SORNA's enactment in 2006, the Attorney General had administered national standards for sex-offender registration, overseen the effort to implement conforming programs in all 50 States, and established a national sex-offender database. See *Ambert*, 561 F.3d at 1214 n.3; see also p. 3, *supra*.

Nothing about Congress's decision to harness the Attorney General's expertise and experience to address these implementation problems negated the "general policy," *American Power & Light*, 329 U.S. at 105, that

Congress established in SORNA. The delegation of authority to address transition-period implementation issues concerning pre-Act offenders did not erase SORNA's overriding objective to "establish[] a comprehensive national system for the registration of [sex] offenders," 34 U.S.C. 20901, designed to "provide the broadest possible protection to the public," *Ambert*, 561 F.3d at 1213. Congress merely "delegat[ed] to the Attorney General the judgment whether" that clear general policy "would be offset, in the case of pre-SORNA sexual offenders, by problems of administration, notice and the like for this discrete group of offenders—problems well suited to the Attorney General's on-the-ground assessment." *United States* v. *Parks*, 698 F.3d 1, 7-8 (1st Cir. 2012), cert. denied, 569 U.S. 960 (2013).

c. At a minimum, the general policy Congress identified in SORNA is more than sufficient given the limited scope of the authority it delegates. Petitioner concedes (Br. 16) that "the degree of agency discretion that is acceptable varies according to the scope of the power" delegated. *American Trucking*, 531 U.S. at 475. When Congress grants the Executive sweeping authority—such as power to "set[] air standards that affect the entire national economy"—Congress "must provide substantial guidance" to the agency. *Ibid.* In contrast, when Congress confers narrow authority—such as the discretion to define a minor statutory term—it "need not provide any direction." *Ibid.*

Put differently, "the question to be asked is not whether there was any explicit principle telling the" Executive how to exercise its statutory discretion, "but whether any such guidance was needed, given the nature of the delegation and the officer who is to exercise the delegated authority." *Loving*, 517 U.S. at 772.

*Loving* upheld against a nondelegation challenge a statute authorizing the President to select aggravating factors for the death penalty in military cases. *Id.* at 771-774. The absence of specific statutory direction concerning how to select those factors was immaterial because "the delegation [was] set within boundaries the President may not exceed" and because the delegation fell within the "traditional authority" of the Executive official at issue—*i.e.*, the President's prerogative to set rules for the military. *Id.* at 772.

Here, as in *Loving*, the limited scope of the authority SORNA confers on the Attorney General made detailed statutory direction unnecessary. The "Attorney General's discretion" is confined "to a narrow and defined category" of sex offenders: "those convicted" of qualifying sex offenses "prior to July 27, 2006," when SORNA was enacted, or prior to SORNA's implementation in a particular jurisdiction. *Ambert*, 561 F.3d at 1214. And the Attorney General's authority with respect to that "class of offenders" is limited to determining whether they must comply with SORNA's civil registration requirements, all the key aspects of which are spelled out in the statute itself. *Ibid.* Section 20913(d) does not empower the Attorney General to impose any additional obligations. He may determine only whether already convicted sex offenders, whose crimes would trigger SORNA's registration duty if they had been committed after SORNA, should be required to register or instead be exempt. That limited discretion dovetails with the Attorney General's role in administering national standards for sex-offender registries. Given the narrow scope of the Attorney General's discretion, no more specific congressional "direction," *American Trucking*, 531 U.S. at 475, was needed.

Indeed, the scope of the authority SORNA granted the Attorney General is no different for nondelegation purposes from the discretion to exempt otherwise covered individuals from the duty to register. Many statutes authorize the Executive to grant exemptions from otherwise applicable requirements.[6] Congress could have adopted that approach in SORNA without altering the extent of the Attorney General's authority. Cf. *Reynolds*, 565 U.S. at 450 (Scalia, J., joined by Ginsburg, J., dissenting) (observing that "giv[ing] the Attorney General the power to reduce congressionally imposed requirements" would "'pose[ ] no constitutional question'" (citation and emphasis omitted)).

To be sure, such a statute would have established a different default rule for the transitional period from SORNA's enactment until the Attorney General acted. Had Congress expressly imposed SORNA's registration requirement on all pre-Act offenders and empowered the Attorney General to make exceptions, pre-Act offenders would have been subject to the registration requirements immediately. In contrast, under Section 20913(d), pre-Act offenders were not required to register until the Attorney General took action. As the Court explained in *Reynolds*, Congress had good reasons for setting a default rule that did not require pre-Act

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[6] See, *e.g.*, 7 U.S.C. 1637b(b)(2)(D) (reporting requirements for small dairy producers); 15 U.S.C. 78u-5(g) (various securities-law requirements); 15 U.S.C. 78j-1(m)(3)(C) (audit-committee independence requirements); 15 U.S.C. 5711(a)(5) (requirements on pay-per-call services); 16 U.S.C. 823a(b) (requirements for hydroelectric facilities); 29 U.S.C. 1112(c) (bonding requirements for employee-benefit plans); 46 U.S.C. 4305 (recreational-vessel requirements); 49 U.S.C. 20306, 47528(b) (railroad-equipment and aircraft-noise-control requirements).

offenders to register until the Attorney General took action. See 565 U.S. at 440-442, 444-445.

But regardless of the transition-period default rule Congress established in SORNA, the *scope* of the Attorney General's decisionmaking authority—and thus the degree of specificity with which Congress had to articulate the statute's general policy—would be the same. Under both SORNA and a statute conferring authority to exempt pre-Act offenders from the registration requirement in light of practical concerns, the Attorney General could make the same ultimate decision: whether and which pre-Act offenders must register. And either way, the general policy Congress conveyed to require registration to the extent practicable is sufficient under this Court's precedent.

***3. Petitioner's contrary arguments lack merit***

a. Petitioner urges (Br. 46) the Court to read Section 20913(d) in a vacuum by ignoring SORNA's statements of purpose because they are not "tied to" the delegation provision itself. But courts "do not . . . construe statutory phrases in isolation"; they must instead "read statutes as a whole." *Samantar* v. *Yousuf*, 560 U.S. 305, 319 (2010) (citation omitted). "Statutory construction * * * is a holistic endeavor," and "[a] provision that may seem ambiguous in isolation" may be "clarified by the remainder of the statutory scheme," including when "only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Savs. Ass'n* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (Scalia, J.).

Consistent with that approach, the Court has previously relied on Congress's express statements of purpose —including in separate statutory provisions—in determin-

ing that a grant of discretion did not constitute an impermissible delegation of legislative authority. For example, in *NBC*, the Court addressed provisions of the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, charging the FCC with regulating broadcast licensing "as public interest, convenience, or necessity" requires. 319 U.S. at 215, 225. The Court rejected a nondelegation challenge to those provisions. *Id.* at 225-226. The Court explained that, even assuming the delegation would be invalid if "construed as comprehensively as the words alone permit," the statutory context—including "'the purpose of the Act'" set forth in a separate statutory provision, together with the statutory "'context'" and "'the requirements'" the statute itself "'impose[d]'"—showed that the public-interest criterion was not "'a mere general reference to public welfare without any standard to guide determinations.'" *Id.* at 226 (quoting *New York Cent. Sec. Corp.* v. *United States*, 287 U.S. 12, 24 (1932)); see *id.* at 214; see also *New York Cent. Sec.*, 287 U.S. at 24-25; *Grimaud*, 220 U.S. at 515-516. Likewise here, the Court cannot look only at Section 20913(d) in isolation. The entirety of SORNA's text and context can and should be read to inform the Attorney General's exercise of his discretion under Section 20913(d), which avoids any nondelegation concern. See *Mistretta*, 488 U.S. at 373 n.7 (explaining that Court has avoided constitutional concerns by "giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional").

b. Petitioner alternatively contends (Br. 47) that SORNA's express purpose of "protect[ing] the public" by "establish[ing] a comprehensive national system for the registration of [sex] offenders," 34 U.S.C. 20901, is too generalized to provide adequate guidance regarding pre-

Act offenders. But as this Court has recognized, Congress's objective to encompass pre-Act offenders is clear from SORNA's text and context. *Reynolds*, 565 U.S. at 442. "The Act reflects" Congress's purpose to create a "'comprehensive national system'" for registration "that *includes* offenders who committed their offenses before the Act became law." *Ibid.* (quoting 34 U.S.C. 20901). Petitioner relatedly argues that Congress did not pursue that purpose "at all costs" because other SORNA provisions do not "cover as many offenders as possible in every situation." Pet. Br. 47, 49 (citation omitted); see *id.* at 47-50. But the fact that Congress itself drew some lines and excluded some offenders from the statute's scope does not diminish the general policy favoring registration of covered sex offenders (including pre-Act offenders) who do otherwise satisfy the statute's criteria.

Petitioner further contends (Br. 31) that SORNA's purpose and context are insufficient because they do not specify particular "criteria an Attorney General should (or should not) consider." This Court's decisions make clear that Congress was not required to supply such granular direction. Even for statutes that confer much broader authority than Section 20913(d), the Court has held that Congress need not "provide a 'determinate criterion' for saying 'how much of the regulated harm is too much.'" *American Trucking*, 531 U.S. at 475 (brackets and citation omitted). The Court has repeatedly upheld delegations that identify a general standard—for example, authority to license radio broadcasters "as public interest, convenience, or necessity" requires, *NBC*, 319 U.S. at 225-226; to set "just and reasonable" rates for natural gas, *Hope Natural Gas*, 320 U.S. at 600; and to establish commodity prices that would be "fair and equitable," *Yakus*, 321 U.S. at 427; see *Avent* v. *United*

*States*, 266 U.S. 127, 130 (1924) (Holmes, J.) (statute authorizing emergency rules for railroad-equipment shortages that are "reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed"); see also *Loving*, 517 U.S. at 758 (explaining that to "burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government").

The Court also has declined to require that Congress quantify or otherwise predetermine the precise degree of harm or range of conduct to regulate. In *Touby*, for example, the Court upheld the delegation in the Controlled Substances Act, 21 U.S.C. 801 *et seq.*, to the Attorney General to designate controlled substances on a temporary basis (triggering criminal consequences). 500 U.S. at 164-167. The Court "did not require the statute to decree how 'imminent' was too imminent, or how 'necessary' was necessary enough, or even * * * how 'hazardous' was too hazardous." *American Trucking*, 531 U.S. at 475 (citation omitted). So too here, in creating a "comprehensive national system for the registration of [sex] offenders" designed "to protect the public," 34 U.S.C. 20901, Congress was not required by this Court's precedent to specify just how "comprehensive" that system should be or exactly how much "protect[ion]" (*ibid.*) from pre-Act offenders was needed.

Those are precisely the sorts of details that petitioner faults Congress for not addressing in SORNA: for instance, whether the Attorney General should have required registration of offenders with very old sex crimes (Br. 31), or how to determine when the registration period began to run for a pre-SORNA offender (Br. 33). Respecting our constitutional structure does not

turn on those particulars. Instead, this Court's precedents make clear that what the separation of powers demands is that SORNA conveyed a general policy to require pre-Act offenders to register to the extent feasible. See pp. 15-21, *supra*. Indeed, petitioner does not appear to contest that SORNA would pass muster if it explicitly stated: the Attorney General is authorized to specify the applicability of SORNA's registration requirements to pre-Act offenders "to the maximum extent he finds to be feasible." And the Court in *Reynolds* already recognized that SORNA's text and context together convey that instruction. No additional instruction was necessary.

c. Petitioner attempts (Br. 34-35) to analogize SORNA to the only two statutory provisions the Court has ever held to violate the nondelegation doctrine in *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935), and *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935). Both cases concerned provisions of the Recovery Act, a comprehensive law "to regulate the entire economy" enacted at the beginning of the Franklin D. Roosevelt Administration in the depths of the Great Depression. *American Trucking*, 531 U.S. at 474. The fatal flaw the Court identified in each provision was that "Congress had failed to articulate *any* policy or standard that would serve to confine the discretion of the authorities to whom Congress had delegated power." *Mistretta*, 488 U.S. at 373 n.7 (emphasis added). By contrast here, Congress said in SORNA that it wanted to "establish a *comprehensive* national system for the registration of [sex] offenders," 34 U.S.C. 20901 (emphasis added), and this Court recognized in *Reynolds* that Congress's policy "*includes* offenders who committed their offenses before [SORNA] became law," 565 U.S. at 442. SORNA is thus importantly

different from the rudderless grants of authority in the Recovery Act.

More specifically, *Panama Refining* involved Section 9(c) of the Recovery Act, which authorized the President "to prohibit the transportation in interstate and foreign commerce of petroleum * * * withdrawn from storage in excess" of state-set quotas and also specified a penalty for violating any such potential prohibition. 293 U.S. at 406 (citation omitted). The Court held the law invalid because it "establishe[d] no criterion to govern the President's course." *Id.* at 415. The Act's goals also did little to inform the President's decisionmaking. Its "general outline of policy * * * favor[ed] the fullest possible utilization of the present productive capacity of industries" to mobilize the economy and speed economic recovery. *Id.* at 417-418. But Section 9(c) asked the President to determine instances in which such "fullest possible utilization"—*i.e.*, marketing oil above State-imposed quotas—should be a crime. *Id.* at 406. Virtually any invocation of the President's power therefore would have been in substantial tension with the Act's central goal, and the Court concluded that the statute gave no indication of the countervailing "circumstances or conditions in which" departing from that central goal would be warranted. *Id.* at 418. Here, as the *Reynolds* Court explained, Congress wanted pre-SORNA offenders to register to the extent practicable, see 565 U.S. at 445, and the Attorney General's exercise of his authority under Section 20913(d) is fully consistent with Congress's objective.

*Schechter Poultry* is even further afield. There, the Court reversed convictions under the Code of Fair Competition for the Live Poultry Industry, promulgated under Section 3 of the Recovery Act. 295 U.S. at

521. Section 3 permitted a trade association to write a code of fair competition to govern its industry and ask the President to approve it. *Id.* at 521 n.4. The President could approve the proposed code so long as the trade association "impose[d] no inequitable restrictions on admission to [its] membership" and the code was "not designed to promote monopolies." *Ibid.* (citation omitted). The Live Poultry Code covered parts of three States and set rules encompassing everything from laborers' working hours and conditions, to quality control, to a requirement that prohibited wholesalers from allowing retailers to select individual chickens (rather than purchasing whole or half coops). *Id.* at 524-528.

This Court held that Congress had not "established the standards of legal obligation" because it did not provide "any adequate definition of the subject to which the codes [were] to be addressed" and did "not define 'fair competition.'" *Schechter Poultry*, 295 U.S. at 530-531. Section 3 "supplie[d] no standards for any trade, industry or activity," instead granting the President "virtually unfettered" discretion. *Id.* at 541-542. And it "prescribed no method of attaining" its goal of "rehabilitat[ing] industry"; provided no limitations on the "nature" of the codes that could be created; and "delegated, not to a public official responsible to Congress or the Executive, but to private individuals engaged in the industries to be regulated" the power to write the codes. *Yakus*, 321 U.S. at 424 (discussing *Schechter Poultry*); see *Department of Trans.* v. *Association of Am. R.R.*, 135 S. Ct. 1225, 1237-1238 (2015) (Alito, J., concurring) (distinguishing delegations to federal agencies from those to nongovernmental entities).

SORNA suffers none of those flaws. The statute specifically delineates the subject the Attorney General is

authorized to address: the applicability of statutory registration requirements to a defined subset of otherwise covered sex offenders. Congress also identified both the statutory objective and the method of attaining it: requiring sex offenders to register as part of a comprehensive national system. And petitioner does not dispute that Congress intended the Attorney General to exercise his authority to require pre-Act offenders to register. SORNA is therefore far removed from the provisions in *Panama Refining* and *Schechter Poultry* that exceeded the outer limits of Congress's power.

## II. PETITIONER'S ARGUMENTS THAT THE COURT SHOULD APPLY A SPECIAL, HEIGHTENED NONDELEGATION STANDARD TO SORNA LACK MERIT

Unable to show that SORNA impermissibly delegates legislative power under this Court's precedent, petitioner urges (Br. 19-21, 23-25, 28-41) the Court to apply a different, more stringent nondelegation test. But because SORNA, properly construed, establishes a general policy that pre-SORNA offenders should be required to register to the extent possible, the statute provides sufficient guidance to the Attorney General under any level of scrutiny. As the Court recognized in *Reynolds*, Congress intended and expected the Attorney General to exercise his authority to encompass pre-Act offenders if feasible. See 565 U.S. at 442-445. The limited scope of the Attorney General's discretion concerning only a defined subset of sex offenders, the narrow authority Congress conferred to require such offenders to register, and the practical concerns that prompted Congress to vest that discretion in the Executive, see pp. 21-31, *supra*, all confirm that SORNA passes muster under any test. It is therefore unnecessary for this

Court to consider any of petitioner's arguments for some level of heightened scrutiny.

It is unnecessary for a second reason as well. Petitioner contends that heightened nondelegation scrutiny should apply to laws that raise retroactivity or federalism concerns and to laws that authorize the Executive to define crimes. But as explained below, SORNA does not implicate any of those concerns. In any event, the Court has already rejected "application of a different and stricter nondelegation doctrine" based on the topic a statute regulates or the constitutional authority Congress is exercising, *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 222 (1989); see *id.* at 220-223 (taxing power); *Loving*, 517 U.S. at 767 (regulation of the military); *J.W. Hampton*, 276 U.S. at 409 (customs duties), and it has never held that any of the concerns petitioner raises requires a higher standard. Petitioner does not justify departing from the Court's precedent.

**A. SORNA Does Not Implicate Retroactivity Concerns**

Petitioner suggests (Br. 37-38) that heightened nondelegation scrutiny should apply to SORNA because the statute raises retroactivity concerns. That is incorrect. SORNA raises no retroactivity concerns because its registration requirements and criminal penalties apply only prospectively. When Section 20913 was enacted, it did not purport to require sex offenders to have registered already. And this Court made clear in *Carr* that SORNA's criminal provision, 18 U.S.C. 2250(a), does not impose any criminal penalties for failing to register before SORNA's enactment. See *Carr*, 560 U.S. at 447 (SORNA did not impose criminal penalties for failing to register until a sex offender became "subject to SORNA's registration requirements," which "c[ould] occur only after the statute's effective date").

Petitioner's contention (Br. 37) that SORNA imposes criminal consequences based on past conduct is therefore mistaken. For all covered sex offenders, the statute imposes punishment only if a pre-Act offender fails to register going forward, *i.e.*, after becoming subject to SORNA. For pre-Act offenders like petitioner, that did not occur until the Attorney General issued the interim rule in 2007. See *Reynolds*, 565 U.S. at 439-446. And offenders like petitioner who had been convicted of state-law sex offenses before SORNA could not face sanctions under SORNA unless and until they also traveled in interstate or foreign commerce after SORNA took effect and then failed to register. 18 U.S.C. 2250(a); see *Carr*, 560 U.S. at 445-450. In this respect, SORNA is no different from any statute that imposes a prospective obligation to report or publicly disclose facts concerning past conduct.

Even assuming SORNA applies retroactively, petitioner cites no decision of this Court applying a special nondelegation test to laws with retroactive application. He is correct (Br. 29) that the Court ordinarily presumes statutes do not apply retroactively "unless Congress ha[s] made clear its intent" to the contrary, *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 270 (1994), and "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood" to authorize "retroactive rules" unless Congress so provides, *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). It follows from those presumptions that Congress must clearly authorize the Executive to promulgate regulations that apply retroactively. But it does *not* follow that, when Congress clearly authorizes the Executive to act with retroactive effect, its legislation should be judged under a special test for nondelegation

purposes. The relevant inquiry remains whether Congress has defined the official to whom the (retroactive) authority is delegated, the limits of that delegated authority, and the general policy that the official is to pursue in exercising that authority.

Petitioner's suggestion in passing (Br. 37 n.6) that the Court should apply a higher nondelegation standard to avoid constitutional doubts under the Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3, fails for similar reasons. As every court of appeals to address the issue has concluded—several even before *Carr*—SORNA presents no ex post facto problem.[7] *Carr*'s holding that SORNA imposes punishment only for a sex offender's failure to register after SORNA took effect, 560 U.S. at 445-450, confirms that conclusion. In any event, the Court has not applied special nondelegation standards merely because a statute implicates some other constitutional question. See, *e.g.*, *NBC*, 319 U.S. at 225-226 (applying intelligible-principle test to radio-broadcast regulations implicating First Amendment issues).

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[7] See *Parks*, 698 F.3d at 4-6; *United States* v. *Elkins*, 683 F.3d 1039, 1043-1045 (9th Cir. 2012); *Felts*, 674 F.3d at 605-606; *United States* v. *Leach*, 639 F.3d 769, 772-773 (7th Cir. 2011); *United States* v. *Shenandoah*, 595 F.3d 151, 158-159 (3d Cir.), cert. denied, 560 U.S. 974 (2010), abrogated on other grounds by *Reynolds*, *supra*; *Guzman*, 591 F.3d at 94; *United States* v. *Young*, 585 F.3d 199, 203-206 (5th Cir. 2009) (per curiam); *United States* v. *Gould*, 568 F.3d 459, 466 (4th Cir. 2009), cert. denied, 559 U.S. 974 (2010); *Ambert*, 561 F.3d at 1207-1208; *United States* v. *Hinckley*, 550 F.3d 926, 935-938 (10th Cir. 2008), cert. denied, 556 U.S. 1240 (2009), abrogated on other grounds by *Reynolds*, *supra*; *United States* v. *May*, 535 F.3d 912, 919-920 (8th Cir. 2008), cert. denied, 556 U.S. 1258 (2009), abrogated on other grounds by *Reynolds*, *supra*; cf. *Smith* v. *Doe*, 538 U.S. 84, 92-106 (2003) (considering Alaska's similar regime).

### B. SORNA Does Not Implicate Federalism Concerns In This Context

Petitioner also contends (Br. 38-39) that a higher standard should apply where "state sovereign interests" are implicated. But the relevant SORNA provisions do not implicate the States. The statute under which petitioner was prosecuted, 18 U.S.C. 2250(a), applies only to individuals, not to the States. And the underlying provisions that required petitioner to register as a sex offender, 34 U.S.C. 20913(a)-(c), also impose obligations only on sex offenders, not state governments. Even assuming the relevant provisions of SORNA raise any federalism concerns, petitioner does not explain why those concerns, beyond requiring Congress to legislate clearly when it comes to the States, should subject clear legislation to a higher standard for nondelegation purposes. And he identifies no decision of this Court applying special nondelegation standards because of federalism concerns.

To be sure, SORNA does contain other provisions that do affect States, but none of them bears on petitioner's conviction. In other provisions of SORNA, Congress "used Spending Clause grants to encourage States to adopt its uniform definitions and requirements," but "[i]t did not insist that the States do so." *United States* v. *Kebodeaux*, 570 U.S. 387, 397-398 (2013); *e.g.*, 34 U.S.C. 20927(a) and (d). Some States have done so; others have not.[8] Congress's use of funding conditions to encourage cooperation from States is commonplace, and petitioner does not attempt to show that Congress exceeded its Spending Clause authority

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[8] Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, U.S. Dep't of Justice, *SORNA State and Territory Implementation Progress Check* (Apr. 5, 2018), https://www.smart.gov/pdfs/SORNA-progress-check.pdf.

in SORNA. See *South Dakota* v. *Dole*, 483 U.S. 203, 207-208 (1987); see also *Kebodeaux*, 570 U.S. at 397-398. In any event, as lower courts have consistently recognized, neither petitioner's duty to register under Section 20913 and the regulations nor his conviction under Section 2250(a) depended on SORNA's funding conditions or any State's compliance with them. See *United States* v. *Felts*, 674 F.3d 599, 603-605 (6th Cir. 2012) (collecting cases); Guidelines, 73 Fed. Reg. at 38,046. Any concerns such conditions might raise in other contexts are thus irrelevant here.

In a footnote, petitioner questions (Br. 40 n.7) Congress's Article I authority to impose SORNA's registration requirements on state sex offenders. The district court rejected that argument, J.A. 90, and petitioner did not renew the argument in the court of appeals, Pet. C.A. Br. 10-24, which accordingly did not address it, J.A. 12-18; see *United States* v. *Williams*, 504 U.S. 36, 41 (1992). The argument also is outside the scope of the single question on which the Court granted certiorari, see *Thornton* v. *United States*, 541 U.S. 615, 622 n.2 (2004), and has no bearing on the standard that governs petitioner's nondelegation challenge. Moreover, any challenge to Section 20913's registration requirements would be academic here because petitioner was convicted of violating 18 U.S.C. 2250(a) for failing to register after traveling in interstate commerce. Petitioner does not dispute, and every court of appeals to address

the issue has concluded, that Section 2250(a) is a valid exercise of Congress's interstate-commerce authority.[9]

### C. SORNA Does Not Empower The Attorney General To Create Federal Crimes

1. Petitioner additionally contends (Br. 20) that heightened nondelegation scrutiny should apply to SORNA because it empowers the Attorney General to "define[] crimes." Pet. Br. 19-21, 24; see ACLU Amicus Br. 5-24; Araiza et al. Amicus Br. 18-24. That is incorrect. If SORNA in fact authorized the Executive to create new federal crimes out of whole cloth, that would raise substantial constitutional questions about nondelegation (under any standard). But in enacting SORNA, Congress itself established the new crime of failing to register and prescribed the elements of and punishment for that offense. 18 U.S.C. 2250(a). Congress also separately imposed the underlying "civil registration requirement." *Kebodeaux*, 570 U.S. at 395; *Felts*, 674 F.3d at 606 (SORNA registration is a civil requirement); see 34 U.S.C. 20913(a)-(c). The Attorney General's regulations implement that civil registration regime; they do not define any criminal offense. 28 C.F.R. 72.3.

The fact that the criminal offense in Section 2250(a) is predicated in part on the applicability of the civil registration requirement to a particular offender—which the Attorney General can determine for pre-Act offenders—

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[9] *Parks*, 698 F.3d at 6-7; *United States* v. *Coleman*, 675 F.3d 615, 619-621 (6th Cir.), cert. denied, 568 U.S. 826 (2012); *Guzman*, 591 F.3d at 89-91; *Shenandoah*, 595 F.3d at 160-161; *United States* v. *Zuniga*, 579 F.3d 845, 850 (8th Cir. 2009) (per curiam), cert. denied, 560 U.S. 954 (2010), abrogated on other grounds by *Reynolds*, *supra*; *Hinckley*, 550 F.3d at 939-940.

is unremarkable. Many statutes give agencies responsibility for decisions that in turn affect whether a particular individual will face criminal liability.[10] Indeed, in many statutes Congress has given agencies authority to prescribe substantive requirements in rules and regulations and has separately made it a crime to violate those requirements.[11]

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[10] See, *e.g.*, 15 U.S.C. 78g(c)(3)(B), 78ff (exempting certain forms of credit from restrictions that carry criminal penalties unless Federal Reserve Board regulations specify otherwise); 19 U.S.C. 1629(c) (authorizing Secretary of the Treasury to apply U.S. customs law in whichever foreign countries he chooses, including "criminal laws of the United States relating to the importation or exportation of merchandise, filing of false statements, and the unlawful removal of merchandise from customs custody"); 22 U.S.C. 614(b), 618 (requiring registered foreign agents to include a "conspicuous statement" of their status on certain communications, subject to criminal penalties, and authorizing Attorney General to define a "conspicuous statement").

[11] See, *e.g.*, 7 U.S.C. 87b(a)(13), 87c, 2024(b) (Department of Agriculture grain-inspection and food-stamp regulations); 15 U.S.C. 78ff(a) (SEC regulations); 15 U.S.C. 2068(a)(1), 2070 (Consumer Product Safety Commission regulations); 15 U.S.C. 2614(1), 2615(b) (toxic-substance-control regulations); 15 U.S.C. 3414(a) and (c)(2) (natural-gas regulations); 19 U.S.C. 1436(a)(4) and (c), 1459(e)(4) and (g) (customs and entry regulations); 29 U.S.C. 666(e) (Occupational Safety and Health Administration regulations); 31 U.S.C. 5322 (Treasury regulations respecting monetary-instruments transactions); 33 U.S.C. 1319(c), 1415(b) (EPA water-quality requirements and ocean-dumping regulations); 42 U.S.C. 4909(a), 4910(a), 6928(d), 6992d(b) (EPA noise-control, solid-waste-management, and medical-waste regulations); 42 U.S.C. 8432 (Department of Energy regulations); 43 U.S.C. 1350(c) (regulations for outer-continental-shelf leasing); 46 U.S.C. 3718(b) (regulations for inspection of vessels carrying dangerous liquid-bulk cargo); 49 U.S.C. 521(b)(6) (commercial-motor-vehicle safety requirements).

In particular, SORNA is one of a number of statutes that impose reporting or similar requirements and that make failure to report a criminal offense, while granting the Executive discretion concerning which persons or conduct are subject to the reporting obligation.[12] For example, a provision of the Bank Secrecy Act, 31 U.S.C. 5313(a), requires the Secretary of the Treasury to determine who "shall file a report on [a] transaction" "for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes)." *Ibid.* The willful violation of "a regulation prescribed" under the Bank Secrecy Act is a felony. 31 U.S.C. 5322. Exercising that authority, the Secretary has determined that "[e]ach financial institution other than a casino" must file the reports for transactions exceeding $10,000. 31 C.F.R. 1010.311. That Congress has conferred authority to agencies regarding those reporting requirements does not mean that Congress has improperly outsourced its power to establish federal crimes. See, *e.g.*, *United States* v. *Sans*, 731 F.2d 1521, 1528 (11th Cir. 1984) (rejecting nondelegation challenge to previous version of 31 U.S.C. 5313(a)), cert. denied, 469 U.S. 1111 (1985).

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[12] See, *e.g.*, 15 U.S.C. 78p(e), 78u-5(b), 78ff (exempting certain transactions and statements from statutory disclosure and other requirements, which carry criminal penalties, unless in violation of SEC regulations); 49 U.S.C. 5108(a)(2), 5124 (authorizing Secretary of Transportation to require registration statements from persons transporting hazardous materials and imposing criminal penalties for violations); 49 U.S.C. 11145(a)(1), 11903 (authorizing Surface Transportation Board to require reports from rail carriers and imposing criminal penalties for willfully filing a false report); 49 U.S.C. 14123(a)(2), 14907 (similar for motor carriers); 49 U.S.C. 15723, 16102 (similar for pipeline carriers).

2. This Court has upheld statutes that delegate authority to the Executive to make determinations that in turn affect criminal liability, applying the same standards it has applied to other delegations. See, *e.g.*, *Yakus*, 321 U.S. at 427; *Avent*, 266 U.S. at 130; *McKinley* v. *United States*, 249 U.S. 397, 399 (1919); *Grimaud*, 220 U.S. at 517-520; *Monongahela Bridge Co.* v. *United States*, 216 U.S. 177, 192-193 (1910); *Union Bridge*, 204 U.S. at 386-387; *Kollock*, 165 U.S. at 532-533. In so doing, the Court has expressly drawn the distinction between Executive authority to create new federal crimes and the lesser authority to determine subsidiary issues that indirectly affect criminal liability.

For example, in *Kollock*, the Court upheld a criminal conviction for selling oleomargarine in packaging that did not conform to Internal Revenue Service labeling regulations. 165 U.S. at 532-533. The defendant challenged his conviction on the ground that Congress could not "delegate to the commissioner of internal revenue * * * authority or power to determine what acts shall be criminal." *Id.* at 527 (statement of case). The Court rejected that argument because the *statute* identified the crime's elements and "prescribed the punishment," and thus "[t]he criminal offence [was] fully and completely defined by the act." *Id.* at 533. Congress itself had mandated compliance with the labeling requirements and had made violations of them a crime. The fact that some "detail[s]" of the offense were prescribed by the regulations was not dispositive; "[t]he regulation was in execution of, or supplementary to, but not in conflict with, the law itself, and was specifically authorized thereby in effectuation of the legislation which created the offence." *Ibid.* Similarly, in *Grimaud*, the Court upheld a conviction under a statute that made it an

offense to graze animals in a federal forest in violation of regulations adopted by the Secretary of Agriculture. 220 U.S. at 515-523. As the Court explained, the law was not problematic because "[a] violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress," and "[t]he statute, not the Secretary, fixes the penalty." *Id.* at 522.

*Grimaud* and *Kollock* each distinguished *United States* v. *Eaton*, 144 U.S. 677 (1892), in which the Court had held that an oleomargarine dealer could not be criminally punished for violating agency regulations that required certain bookkeeping practices—because Congress had not made violating those requirements a crime in the statute. *Id.* at 686-688; see *Grimaud*, 220 U.S. at 518-519; *Kollock*, 165 U.S. at 533, 535-537. As the Court explained in *Grimaud*, "the very thing which was omitted in" the statute in *Eaton* "ha[d] been distinctly done" in the statute *Grimaud* upheld: Congress itself had established the crime and determined the penalty. *Grimaud*, 220 U.S. at 519. The same was true in *Kollock*. See 165 U.S. at 532.

In SORNA, as in the statutes upheld in *Grimaud* and *Kollock*, Congress established the crime of failure to register and prescribed the penalty. 18 U.S.C. 2250(a). And Congress prescribed the underlying obligation to register. 34 U.S.C. 20913(a)-(c). That Congress authorized the Attorney General to determine whether a specific subset of sex offenders must comply with that underlying duty is not critical for nondelegation purposes. What matters is that Congress defined the "criminal offence." *Kollock*, 165 U.S. at 533.

3. More generally, the Court has upheld statutes in which Congress imposed criminal penalties for violating

rules Congress authorized agencies to adopt. In *Yakus*, for example, the Court upheld convictions under the Emergency Price Control Act of 1942, which authorized the Price Administrator to issue "orders fixing such maximum prices of commodities and rents as w[ould] effectuate" the Act's purposes. 321 U.S. at 419; see *id.* at 419-427. The Court rejected the defendants' contention that the delegation was unconstitutional. *Id.* at 423-427. The Court explained that the delegation was valid because "Congress ha[d] stated the legislative objective"; "prescribed the method of achieving that objective," *i.e.*, "maximum price fixing"; and "laid down standards to guide the administrative determination of both the occasions for the exercise of the price-fixing power, and the particular prices to be established." *Id.* at 423. Even *Panama Refining* and *Schechter Poultry* applied *J.W. Hampton*'s intelligible-principle test in evaluating delegations where violations carried criminal penalties. See *Panama Refining*, 293 U.S. at 429-430; *Schechter Poultry*, 295 U.S. at 541-542.

The Court has applied the same standard to uphold statutes that delegated discretion concerning criminal punishments themselves, explaining that "[t]here is no absolute rule * * * against Congress' delegation of authority to define criminal punishments." *Loving*, 517 U.S. at 768. In *Mistretta*, the Court applied the intelligible-principle standard to uphold Congress's delegation to the Sentencing Commission to promulgate the then-binding Sentencing Guidelines, which governed the imposition of sentences in federal criminal cases. 488 U.S. at 373-374. The Court explained that the "intelligible principle" standard governed and required that "Congress clearly delin[e]ate[] the general policy, the public agency which is to apply it, and the boundaries of this

delegated authority." *Id.* at 372-373 (citation omitted). The Court held that "Congress' delegation of authority to the Sentencing Commission" passed constitutional muster because Congress identified the "goals" and "purposes" for the Commission to pursue; it "prescribed the specific tool—the guidelines system—for the Commission to use"; and it imposed various "constraints" on the Commission's discretion. *Id.* at 374, 376 (citation omitted); see *id.* at 374-379; see also *id.* at 416 (Scalia, J., dissenting) (expressing "full[] agree[ment] with the Court's rejection of petitioner's contention that the doctrine of unconstitutional delegation of legislative authority has been violated because of the lack of intelligible, congressionally prescribed standards").

Indeed, the Court has indicated that the same analysis applies even where Congress vests discretion in the Executive concerning the availability of the death penalty. In *Mistretta*, applying ordinary nondelegation principles, the Court rejected the argument that Congress could not authorize the Commission to include capital punishment in Guidelines sentences for offenses for which a statute authorized the death penalty. 488 U.S. at 378 n.11. And in *Loving*, the Court likewise applied *J.W. Hampton*'s standard to uphold a delegation to the President to identify aggravating factors that could support a death sentence in a court martial. See 517 U.S. at 771-774. If ordinary nondelegation principles apply to the Sentencing Commission's authority to specify which criminal offenses are death-eligible (including under a then-binding regime), and to the President's authority to specify when criminal offenses in the military are death-eligible, surely the same principles should apply to the Attorney General's authority to specify as a *civil* matter when certain sex

offenders are required to register—even if the failure to register carries criminal consequences that Congress itself specified in SORNA.

4. Petitioner does not identify any case in which this Court adopted a heightened nondelegation standard for statutes carrying criminal penalties. He cites *United States* v. *Evans*, 333 U.S. 483 (1948), for the proposition that only Congress may "defin[e] crimes." Pet. Br. 20 (citation omitted). But *Evans* cast no doubt on the rule that Congress may impose criminal penalties for violations of agency rules that Congress has given the agency authority to adopt. Indeed, *Evans* did not address a nondelegation question at all. The case concerned a statute that enumerated two offenses but imposed a penalty for only one of them; the Court held that the Executive could not remedy Congress's mistake by interpreting the statute as implicitly imposing punishment for both acts. 333 U.S. at 484, 486-487. Here, Congress itself defined the elements of the failure-to-register offense and the punishment for committing that offense in 18 U.S.C. 2250(a).

Petitioner cites (Br. 20-21) various decisions addressing the vagueness doctrine. But the principle he derives from those cases—that "individuals are entitled to sufficient notice as to what constitutes a crime" (Br. 20)—does not mean such notice must come solely from a statute rather than in part from a regulation. Petitioner also cites (Br. 21) *Abramski* v. *United States*, 134 S. Ct. 2259 (2014), and *United States* v. *Apel*, 571 U.S. 359 (2014), for the proposition that the Executive's interpretation of federal criminal laws does not receive the same deference as its interpretation of other statutes. But this is not a case about interpreting Section 20913(d) or the Attorney General's regulation—neither of which is

ambiguous. Whether courts should defer to Executive interpretations of criminal statutes is a wholly different question from whether Congress can expressly confer on the Executive the authority to make determinations that affect criminal liability.

Petitioner's amici cite *Touby*, *supra*, in which the Court upheld a delegation of authority to the Attorney General in the Controlled Substances Act to designate controlled substances on a temporary basis. ACLU Amicus Br. 21-22; Araiza et al. Amicus Br. 18-20. But *Touby* did not embrace a different standard for criminal statutes. The petitioner in *Touby* conceded, and the Court agreed, that the statute supplied an intelligible principle. 500 U.S. at 165. He argued, however, that "something more than an 'intelligible principle' is required when Congress authorizes another Branch to promulgate regulations that contemplate criminal sanctions." *Id.* at 165-166. Although the Court suggested that a passage in *Fahey*, *supra*, had created potential uncertainty on the point, *Touby*, 500 U.S. at 166 (stating that the Court's cases "are not entirely clear," and contrasting *Fahey* with *Mistretta*, *Yakus*, and *Grimaud*), *Touby* did not endorse petitioner's argument. Instead, the Court concluded that the Controlled Substances Act provision at issue "passe[d] muster even if greater congressional specificity [were] required." *Ibid.*

Moreover, *Fahey* did not adopt or apply a heightened standard to a statute imposing criminal sanctions. That issue was not presented because the case involved civil regulations governing savings-and-loan associations. 332 U.S. at 249-250. In upholding the delegation at issue, the Court (per Justice Jackson) distinguished *Panama Refining* and *Schechter Poultry* on the ground that the delegations in those cases had conferred power

to make "federal crimes of acts that never had been such before" and to create "new crimes in uncharted fields." *Ibid.* In context, those statements do not suggest that a different constitutional standard applies to regulations with penal consequences. They simply reflect what the Court subsequently explained in *Mistretta* (in a footnote that *Touby* cited): the delegations in *Panama Refining* and *Schechter Poultry* were invalid because they failed to "articulate *any* policy or standard that would serve to confine the [Executive's] discretion." 488 U.S. at 373 n.7 (emphasis added); see *Touby*, 500 U.S. at 166.

**D. Petitioner Has Not Justified Departing From This Court's Nondelegation Cases**

Petitioner also briefly invites (Br. 25) the Court to abandon its nondelegation precedent altogether, but he does not meaningfully engage with historical practice or this Court's precedent dating nearly to the Founding. See pp. 15-21, *supra*. As the Court summarized in *Grimaud*, "[f]rom the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern." 220 U.S. at 517. The fact "that Congress has frequently, from the organization of the government to the present time, conferred upon" the Executive authority to determine whether particular requirements apply to certain entities "is entitled to great weight." *Marshall Field*, 143 U.S. at 683. Petitioner does not appear to dispute this "[l]ong settled and established practice." *The Pocket Veto Case*, 279 U.S. 655, 689 (1929).

Petitioner cites (Br. 25) *Marshall Field* and *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1 (1825), for the

proposition that Congress cannot delegate "legislative" power. But all agree that Congress cannot delegate certain "powers which are strictly and exclusively legislative." *Grimaud*, 220 U.S. at 517 (quoting *Wayman*, 23 U.S. (10 Wheat.) at 42-43). It is equally well settled, of course, that Congress may delegate to the Executive discretion to implement its laws. See pp. 15-21, *supra*. The Court has "often * * * recognized" the "difficulty" of "defin[ing]" in the abstract "the line which separates legislative power to make laws, from administrative authority to make regulations." *Grimaud*, 220 U.S. at 517. The Court's decisions have sought to give concrete content to that distinction and provide guidance for distinguishing impermissible delegations of legislative power from permissible delegations of nonlegislative authority.

Invalidating the regulations promulgated pursuant to Section 20913(d) on nondelegation grounds would likely mean that many pre-Act sex offenders who failed to register in the decade after SORNA became applicable to them would escape criminal sanctions, thwarting one of the statute's central aims. Since SORNA's enactment, approximately 4000 offenders have been convicted of federal sex-offender-registry violations.[13] Given that some of those offenders were required to register based on pre-SORNA offenses, invalidating Section 20913(d) now would likely mean that many of those offenders who failed to register would go free.

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[13] See, *e.g.*, Administrative Office of United States Courts, *Federal Judicial Caseload Statistics, Table D-4: U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending March 31, 2018*, http://www.uscourts.gov/file/24423/download. Data for prior years are available at http://www.uscourts.gov/data-table-numbers/d-4.

Moreover, going forward, holding Section 20913(d) unconstitutional would mean that pre-Act offenders would have no federal obligation to register unless and until Congress intervenes, potentially enabling many offenders to travel or relocate to new jurisdictions without registering and without facing federal criminal sanctions for failing to register. Petitioner here was convicted of drugging and raping an 11-year-old girl, and he seeks the freedom to move anywhere in the country without notice to the community.

Nor does petitioner attempt to justify departing from this Court's decisions. He identifies no development since this Court clarified the governing principles decades ago in *J.W. Hampton* and *American Power & Light* that would warrant restricting Congress's ability to entrust discretion in administering federal law to the Executive. Petitioner also "does not, indeed could not, argue that the rule established" in this Court's cases "is 'unworkable.'" *United States* v. *International Bus. Machines Corp.*, 517 U.S. 843, 856 (1996); cf. *South Dakota* v. *Wayfair, Inc.*, 138 S. Ct. 2080, 2097-2098 (2018) (holding departure from precedent warranted in light of subsequent developments, precedent's "unworkab[ility]," and lack of legitimate reliance interests).

Indeed, it is petitioner's proposed standard that threatens to be unworkable. He proposes (Br. 22) a rule prohibiting Congress from delegating "the power to enact generally applicable, binding rules of private conduct." But SORNA itself establishes both general rules of private conduct and the penalties for violating them. The critical question is how much discretion Congress can delegate to the Executive to make determinations that in turn affect whether a prospective rule established by statute applies to particular private conduct.

On that question, petitioner does not explain with any specificity what separates a permissible delegation from an impermissible one on his view. If petitioner means to argue that Congress can never confer authority on the Executive to make such determinations, his rule would be at odds with this Court's many decisions to the contrary, see pp. 15-21, 47-51, *supra*, and it would frustrate Congress's ability to enlist the Executive's assistance in dealing with complex and changing problems, see *Mistretta*, 488 U.S. at 372. If instead petitioner means to argue that Congress can delegate authority to make determinations that affect the application of prospective rules, so long as Congress is clear about its general policy, then the only question here is whether SORNA's text and context supply such a policy—and this Court in *Reynolds* correctly recognized that they do.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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## APPENDIX

1. 18 U.S.C. 2250 provides:

**Failure to register**

(a) IN GENERAL.—Whoever—

(1) is required to register under the Sex Offender Registration and Notification Act;

(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

(b) INTERNATIONAL TRAVEL REPORTING VIOLATIONS.—Whoever—

(1) is required to register under the Sex Offender Registration and Notification Act (42 U.S.C. 16901 et seq.);[1]

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[1] See References in Text note below.

(2) knowingly fails to provide information required by the Sex Offender Registration and Notification Act relating to intended travel in foreign commerce; and

(3) engages or attempts to engage in the intended travel in foreign commerce;

shall be fined under this title, imprisoned not more than 10 years, or both.

(c) AFFIRMATIVE DEFENSE.—In a prosecution for a violation under subsection (a) or (b), it is an affirmative defense that—

(1) uncontrollable circumstances prevented the individual from complying;

(2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and

(3) the individual complied as soon as such circumstances ceased to exist.

(d) CRIME OF VIOLENCE.—

(1) IN GENERAL.—An individual described in subsection (a) or (b) who commits a crime of violence under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States shall be imprisoned for not less than 5 years and not more than 30 years.

(2) ADDITIONAL PUNISHMENT.—The punishment provided in paragraph (1) shall be in addition and consecutive to the punishment provided for the violation described in subsection (a) or (b).

2. 34 U.S.C. 20901 provides:

**Declaration of purpose**

In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this chapter establishes a comprehensive national system for the registration of those offenders:

(1) Jacob Wetterling, who was 11 years old, was abducted in 1989 in Minnesota, and remains missing.

(2) Megan Nicole Kanka, who was 7 years old, was abducted, sexually assaulted, and murdered in 1994, in New Jersey.

(3) Pam Lychner, who was 31 years old, was attacked by a career offender in Houston, Texas.

(4) Jetseta Gage, who was 10 years old, was kidnapped, sexually assaulted, and murdered in 2005, in Cedar Rapids, Iowa.

(5) Dru Sjodin, who was 22 years old, was sexually assaulted and murdered in 2003, in North Dakota.

(6) Jessica Lunsford, who was 9 years old, was abducted, sexually assaulted, buried alive, and murdered in 2005, in Homosassa, Florida.

(7) Sarah Lunde, who was 13 years old, was strangled and murdered in 2005, in Ruskin, Florida.

(8) Amie Zyla, who was 8 years old, was sexually assaulted in 1996 by a juvenile offender in Waukesha,

Wisconsin, and has become an advocate for child victims and protection of children from juvenile sex offenders.

(9) Christy Ann Fornoff, who was 13 years old, was abducted, sexually assaulted, and murdered in 1984, in Tempe, Arizona.

(10) Alexandra Nicole Zapp, who was 30 years old, was brutally attacked and murdered in a public restroom by a repeat sex offender in 2002, in Bridgewater, Massachusetts.

(11) Polly Klaas, who was 12 years old, was abducted, sexually assaulted, and murdered in 1993 by a career offender in California.

(12) Jimmy Ryce, who was 9 years old, was kidnapped and murdered in Florida on September 11, 1995.

(13) Carlie Brucia, who was 11 years old, was abducted and murdered in Florida in February, 2004.

(14) Amanda Brown, who was 7 years old, was abducted and murdered in Florida in 1998.

(15) Elizabeth Smart, who was 14 years old, was abducted in Salt Lake City, Utah in June 2002.

(16) Molly Bish, who was 16 years old, was abducted in 2000 while working as a lifeguard in Warren, Massachusetts, where her remains were found 3 years later.

(17) Samantha Runnion, who was 5 years old, was abducted, sexually assaulted, and murdered in California on July 15, 2002.

3. 34 U.S.C. 20911 provides:

**Relevant definitions, including Amie Zyla expansion of sex offender definition and expanded inclusion of child predators**

In this subchapter the following definitions apply:

**(1) Sex offender**

The term "sex offender" means an individual who was convicted of a sex offense.

**(2) Tier I sex offender**

The term "tier I sex offender" means a sex offender other than a tier II or tier III sex offender.

**(3) Tier II sex offender**

The term "tier II sex offender" means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

(i) sex trafficking (as described in section 1591 of title 18);

(ii) coercion and enticement (as described in section 2422(b) of title 18);

(iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a))[1] of title 18;

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[1] So in original. The second closing parenthesis probably should follow "18".

(iv) abusive sexual contact (as described in section 2244 of title 18);

(B) involves—

(i) use of a minor in a sexual performance;

(ii) solicitation of a minor to practice prostitution; or

(iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a tier I sex offender.

**(4) Tier III sex offender**

The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18); or

(ii) abusive sexual contact (as described in section 2244 of title 18) against a minor who has not attained the age of 13 years;

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

(C) occurs after the offender becomes a tier II sex offender.

**(5) Amie Zyla expansion of sex offense definition**

**(A) Generally**

Except as limited by subparagraph (B) or (C), the term "sex offense" means—

(i) a criminal offense that has an element involving a sexual act or sexual contact with another;

(ii) a criminal offense that is a specified offense against a minor;

(iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of title 18;

(iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note); or

(v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

**(B) Foreign convictions**

A foreign conviction is not a sex offense for the purposes of this subchapter if it was not obtained with sufficient safeguards for fundamental fairness and due process for the accused under guidelines or regulations established under section 20912 of this title.

**(C) Offenses involving consensual sexual conduct**

An offense involving consensual sexual conduct is not a sex offense for the purposes of this subchapter if the victim was an adult, unless the adult

was under the custodial authority of the offender at the time of the offense, or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.

**(6) Criminal offense**

The term "criminal offense" means a State, local, tribal, foreign, or military offense (to the extent specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note)) or other criminal offense.

**(7) Expansion of definition of "specified offense against a minor" to include all offenses by child predators**

The term "specified offense against a minor" means an offense against a minor that involves any of the following:

(A) An offense (unless committed by a parent or guardian) involving kidnapping.

(B) An offense (unless committed by a parent or guardian) involving false imprisonment.

(C) Solicitation to engage in sexual conduct.

(D) Use in a sexual performance.

(E) Solicitation to practice prostitution.

(F) Video voyeurism as described in section 1801 of title 18.

(G) Possession, production, or distribution of child pornography.

(H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.

(I) Any conduct that by its nature is a sex offense against a minor.

**(8) Convicted as including certain juvenile adjudications**

The term "convicted" or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of title 18), or was an attempt or conspiracy to commit such an offense.

**(9) Sex offender registry**

The term "sex offender registry" means a registry of sex offenders, and a notification program, maintained by a jurisdiction.

**(10) Jurisdiction**

The term "jurisdiction" means any of the following:

(A) A State.

(B) The District of Columbia.

(C) The Commonwealth of Puerto Rico.

(D) Guam.

(E) American Samoa.

(F) The Northern Mariana Islands.

(G) The United States Virgin Islands.

(H) To the extent provided and subject to the requirements of section 20929 of this title, a federally recognized Indian tribe.

**(11) Student**

The term "student" means an individual who enrolls in or attends an educational institution, including (whether public or private) a secondary school, trade or professional school, and institution of higher education.

**(12) Employee**

The term "employee" includes an individual who is self-employed or works for any other entity, whether compensated or not.

**(13) Resides**

The term "resides" means, with respect to an individual, the location of the individual's home or other place where the individual habitually lives.

**(14) Minor**

The term "minor" means an individual who has not attained the age of 18 years.

4. 34 U.S.C. 20912 provides:

**Registry requirements for jurisdictions**

**(a) Jurisdiction to maintain a registry**

Each jurisdiction shall maintain a jurisdiction-wide sex offender registry conforming to the requirements of this subchapter.

**(b) Guidelines and regulations**

The Attorney General shall issue guidelines and regulations to interpret and implement this subchapter.

5. 34 U.S.C. 20913 provides:

**Registry requirements for sex offenders**

**(a) In general**

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

**(b) Initial registration**

The sex offender shall initially register—

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

**(c) Keeping the registration current**

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

**(d) Initial registration of sex offenders unable to comply with subsection (b)**

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

**(e) State penalty for failure to comply**

Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

6. 34 U.S.C. 20914 provides:

**Information required in registration**

**(a) Provided by the offender**

The sex offender shall provide the following information to the appropriate official for inclusion in the sex offender registry:

(1) The name of the sex offender (including any alias used by the individual).

(2) The Social Security number of the sex offender.

(3) The address of each residence at which the sex offender resides or will reside.

(4) The name and address of any place where the sex offender is an employee or will be an employee.

(5) The name and address of any place where the sex offender is a student or will be a student.

(6) The license plate number and a description of any vehicle owned or operated by the sex offender.

(7) Information relating to intended travel of the sex offender outside the United States, including any anticipated dates and places of departure, arrival, or return, carrier and flight numbers for air travel, destination country and address or other contact information therein, means and purpose of travel, and any other itinerary or other travel-related information required by the Attorney General.

(8) Any other information required by the Attorney General.

**(b) Provided by the jurisdiction**

The jurisdiction in which the sex offender registers shall ensure that the following information is included in the registry for that sex offender:

(1) A physical description of the sex offender.

(2) The text of the provision of law defining the criminal offense for which the sex offender is registered.

(3) The criminal history of the sex offender, including the date of all arrests and convictions; the status of parole, probation, or supervised release; registration status; and the existence of any outstanding arrest warrants for the sex offender.

(4) A current photograph of the sex offender.

(5) A set of fingerprints and palm prints of the sex offender.

(6) A DNA sample of the sex offender.

(7) A photocopy of a valid driver's license or identification card issued to the sex offender by a jurisdiction.

(8) Any other information required by the Attorney General.

**(c) Time and manner**

A sex offender shall provide and update information required under subsection (a), including information relating to intended travel outside the United States required under paragraph (7) of that subsection, in conformity with any time and manner requirements prescribed by the Attorney General.

7. 34 U.S.C. 20927 provides:

**Failure of jurisdiction to comply**

**(a) In general**

For any fiscal year after the end of the period for implementation, a jurisdiction that fails, as determined by the Attorney General, to substantially implement this subchapter shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3750 et seq.).[1]

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[1] See References in Text note below.

**(b) State constitutionality**

**(1) In general**

When evaluating whether a jurisdiction has substantially implemented this subchapter, the Attorney General shall consider whether the jurisdiction is unable to substantially implement this subchapter because of a demonstrated inability to implement certain provisions that would place the jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction's highest court.

**(2) Efforts**

If the circumstances arise under paragraph (1), then the Attorney General and the jurisdiction shall make good faith efforts to accomplish substantial implementation of this subchapter and to reconcile any conflicts between this subchapter and the jurisdiction's constitution. In considering whether compliance with the requirements of this subchapter would likely violate the jurisdiction's constitution or an interpretation thereof by the jurisdiction's highest court, the Attorney General shall consult with the chief executive and chief legal officer of the jurisdiction concerning the jurisdiction's interpretation of the jurisdiction's constitution and rulings thereon by the jurisdiction's highest court.

**(3) Alternative procedures**

If the jurisdiction is unable to substantially implement this subchapter because of a limitation imposed by the jurisdiction's constitution, the Attorney General may determine that the jurisdiction is in compliance with this chapter if the jurisdiction has made, or

is in the process of implementing[2] reasonable alternative procedures or accommodations, which are consistent with the purposes of this chapter.

**(4) Funding reduction**

If a jurisdiction does not comply with paragraph (3), then the jurisdiction shall be subject to a funding reduction as specified in subsection (a).

**(c) Reallocation**

Amounts not allocated under a program referred to in this section to a jurisdiction for failure to substantially implement this subchapter shall be reallocated under that program to jurisdictions that have not failed to substantially implement this subchapter or may be reallocated to a jurisdiction from which they were withheld to be used solely for the purpose of implementing this subchapter.

**(d) Rule of construction**

The provisions of this subchapter that are cast as directions to jurisdictions or their officials constitute, in relation to States, only conditions required to avoid the reduction of Federal funding under this section.

8. 28 C.F.R. 72.3 (2008) provides:

**Applicability of the Sex Offender Registration and Notification Act.**

The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including

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[2] So in original. Probably should be followed by a comma.

sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.

*Example 1.* A sex offender is federally convicted of aggravated sexual abuse under 18 U.S.C. 2241 in 1990 and is released following imprisonment in 2007. The sex offender is subject to the requirements of the Sex Offender Registration and Notification Act and could be held criminally liable under 18 U.S.C. 2250 for failing to register or keep the registration current in any jurisdiction in which the sex offender resides, is an employee, or is a student.

*Example 2.* A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required, but disappears after a couple of years and does not register in any other jurisdiction. Following the enactment of the Sex Offender Registration and Notification Act, the sex offender is found to be living in another state and is arrested there. The sex offender has violated the requirement under the Sex Offender Registration and Notification Act to register in each state in which he resides, and could be held criminally liable under 18 U.S.C. 2250 for the violation because he traveled in interstate commerce.

9. 28 C.F.R. 72.3 provides:

**Applicability of the Sex Offender Registration and Notification Act.**

The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.

*Example 1.* A sex offender is federally convicted of aggravated sexual abuse under 18 U.S.C. 2241 in 1990 and is released following imprisonment in 2007. The sex offender is subject to the requirements of the Sex Offender Registration and Notification Act and could be held criminally liable under 18 U.S.C. 2250 for failing to register or keep the registration current in any jurisdiction in which the sex offender resides, is an employee, or is a student.

*Example 2.* A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required but relocates to another state in 2009 and fails to register in the new state of residence. The sex offender has violated the requirement under the Sex Offender Registration and Notification Act to register in any jurisdiction in which he resides, and could be held criminally liable under 18 U.S.C. 2250 for the violation because he traveled in interstate commerce.